SECOND DIVISION
December 10, 2013

No. 1-11-2299

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 19273
	)	
ALFREDO RAMOS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Harris and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's *pro se* post-conviction petition affirmed over his contention that he presented an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Alfredo Ramos appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). He contends that he presented a "sufficiently arguable" claim of ineffective assistance of trial counsel to avoid summary dismissal and require further proceedings under the Act.

¶ 3 The record shows that defendant was sentenced to natural life imprisonment on his 2007

jury convictions of two counts of first degree murder, and this court affirmed that judgment on direct appeal. *People v. Ramos*, 396 Ill. App. 3d 869 (2009). On June 7, 2011, defendant filed the instant *pro se* post-conviction petition alleging, *inter alia*, that his trial counsel was ineffective for failing to honor his request for a bench trial and for failing to have his girlfriend, Sara Lynn, testify at the pretrial suppression hearing that police coerced her into convincing defendant to reinitiate discussion with police after he invoked his right to counsel.

¶ 4 In support of his petition, defendant attached his own affidavit in which he averred that he told his trial counsel that he wanted a bench trial because he knew that he "stood a better chance with the judge in this case." Defendant further averred that his trial counsel denied his request for a bench trial, telling him that he was having a jury trial instead of a bench trial because the judge would find him guilty.

¶ 5 Defendant also attached the affidavit of Lynn who averred that on July 11, 2001, she was at the police station for hours being asked questions about defendant. Police told her that if defendant told the truth about the shooting, he would go home, and that she followed the officers' instructions because she wanted to go home as well. The officers told her they wanted to know the whereabouts of the gun used in the shooting, and she convinced defendant to reinitiate conversation with them, saying that this would be best for his family and their relationship. She also told defendant to tell police where the money and gun were located and anything else they wanted to know about the incident. After she spoke with defendant, she told police that defendant was ready to answer any questions.

¶ 6 In support of his contention that he would not have talked to police if Lynn had not persuaded him to do so, defendant attached another affidavit in which he averred that this was the case. He further averred that he gave this information to his trial counsel, but that counsel failed to investigate it.

¶ 7 In further support of his petition, defendant attached the letter he wrote to his appellate attorney, stating that he believed the trial judge, who oversaw his jury trial, was biased against him. This letter is dated May 7, 2009.

¶ 8 The circuit court summarily dismissed defendant's petition finding it to be without merit. In doing so, the court noted that the evidence for the State was "extremely strong." The court further noted that defendant never indicated that he wanted a bench trial, and, in any event, it would "not have done him any good" because the same evidence would have led to the same outcome. The court further found that defendant's allegation that police persuaded his girlfriend to talk to him to get him to tell the truth did not present a claim of constitutional magnitude, and noted that defendant had asked to speak to his girlfriend, who encouraged him to tell the truth. The court further found that the testimony from the girlfriend would not have presented grounds to rule differently on the motion to quash and suppress.

¶ 9 On appeal, defendant contends that he presented two "sufficiently arguable" claims of ineffective assistance of trial counsel to advance his petition to the second stage of proceedings. He first maintains that counsel was ineffective for refusing to allow him to have a bench trial.

¶ 10 At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that defendant only plead sufficient facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of a first-stage dismissal is *de novo* (*People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998)), which allows us to focus on the court's judgment, rather than the reasons for its decision (*People v. Stoecker*, 384 Ill. App. 3d 289, 294 (2008)).

¶ 11 To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶19.

¶ 12 In his petition, defendant asserted that he was denied his right to the effective assistance of trial counsel because he wanted a bench trial and counsel would not let him waive his right to a jury trial. In support of that claim, defendant attached his own affidavit to that effect. Citing *People v. Barkes*, 399 Ill. App. 3d 980 (2010) and *People v. McCarter*, 385 Ill. App. 3d 919, 942-43 (2008), defendant claims here that this was sufficient to set forth an arguable claim of ineffective assistance of counsel.

¶ 13 We initially observe that *McCarter* involved a post-trial motion where defendant alleged that his trial counsel disregarded and overrode his desire for a bench trial. This court held that the trial court's cursory examination of defendant's allegation was insufficient, and remanded the case to the trial court to clarify whether defendant's claim was spurious or required further inquiry. *McCarter*, 385 Ill. App. 3d at 944. It did not, as pointed out by the State, hold that defendant's mere claim was sufficient to state the gist of a constitutional claim under the Act, and we find defendant's reliance on this case misplaced.

¶ 14 In *Barkes*, defendant raised a number of ineffective assistance of trial counsel claims in his post-conviction petition, including that he told counsel that he wanted a bench trial, but counsel refused, and told him that he was running the show. *Barkes*, 399 Ill. App. 3d at 982. Defendant attached his own affidavit in support of that petition, and the case proceeded to second

stage proceedings where additional documentation was provided by counsel. *Barkes*, 399 Ill. App. 3d at 982-83. After taking the allegations in his petition and the supporting affidavit as true, the Second District determined that defendant was entitled to an evidentiary hearing on this issue. *Barkes*, 399 Ill. App. 3d at 988. Defendant contends that this case "is on all fours" with *Barkes*, and entitles him to second stage proceedings. We disagree.

¶ 15 The case at bar, unlike *Barkes*, involves a first-stage dismissal. At that stage, the circuit court is charged with, *inter alia*, examining the record to determine whether the allegations in the petition are positively rebutted by the record. *People v. Jones*, 399 Ill. App. 3d 341, 356-57 (2010). Where the record from the original trial proceedings contradicts defendant's allegation, the dismissal of defendant's post-conviction petition will be upheld. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 16 In this case, there is no indication in the record that defendant wanted or expressed a desire for a bench trial at any time during his pretrial appearances or when trial counsel proceeded with jury selection, or throughout the ensuing jury trial. *People v. Brown*, 2013 IL App (2d) 110327, ¶21. Defendant also raised no ineffective assistance claims or questions concerning the type of trial he received in a post-trial motion. The onus to assert the right to a bench trial is on a criminal defendant (*Brown*, ¶21; *People v. Powell*, 281 Ill. App. 3d 68, 73 (1996)), and where, as here, defendant fails to inform the court that he wanted a bench trial while sitting through jury selection and completion of the trial, his underlying post-conviction claim is rebutted by the record (*Brown*, ¶23), and will not support a claim of ineffective assistance of counsel.

¶ 17 Defendant's claim is also belied by the letter he wrote to his appellate counsel in which he maintained that he believed that his trial judge, who oversaw his jury trial, was biased against him. This sentiment does not support his post-conviction claim that he wanted a bench trial, and,

in fact, renders it self-serving. Under these circumstances, we find that defendant failed to present an arguable claim of ineffective assistance of trial counsel, and his petition was, therefore, subject to summary dismissal. *People v. Little*, 335 Ill. App. 3d 1046, 1050 (2003).

¶ 18 Defendant, however, citing *People v. Holley*, 377 Ill. App. 3d 809 (2007), claims that the portion of *Powell*, relied on by *Brown,* ¶21, is mere *dicta* and distinguishable as it concerned a trial attorney's erroneous communication with defendant as opposed to defendant's communication with his attorney, requiring remand for further inquiry on his post-trial claim of ineffective assistance of counsel. *Holley*, 377 Ill. App. 3d at 813. We find the reasoning in *Powell* sound, as did the Second District in *Brown*, ¶21, and conclude in this post-conviction setting that defendant's claim of ineffective assistance of counsel was positively rebutted by the record and therefore insufficient to state a cognizable claim.

¶ 19 Defendant next contends that his trial counsel was ineffective for failing to call his girlfriend, Lynn, to testify at the suppression hearing that police convinced her to persuade him to reinitiate his conversation with police and tell them where he hid the gun and money after he had already invoked his Fifth Amendment rights. He maintains that Lynn, in essence, acted as a law enforcement agent, and that police interrogated him through Lynn in violation of his *Miranda* rights. He, therefore, posits that if counsel called Lynn, the court would have granted his motion to suppress the gun and the information regarding the location of the money. He maintains that without this evidence, the confidence in the outcome of his trial is undermined, despite the fact that he made incriminating statements to police and two Assistant State's Attorneys prior to talking to his girlfriend and telling police the location of the gun and money.

¶ 20 The State responds that this issue is *res judicata* because defendant alleged in his pre-trial motion to suppress statements that police sent his girlfriend in the interview room to talk to him, and when she exited, she told police that he knew the location of the gun. The State further notes

that at the suppression hearing, counsel argued that police used defendant's girlfriend to talk to him.

¶ 21 Considerations of waiver and *res judicata* limit the range of issues available to a post-conviction petitioner to constitutional matters that have not been and could not have been previously adjudicated. *People v. Mitchell*, 189 Ill. 2d 312, 345 (2000). Rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised, but were not, are waived. *Mitchell*, 189 Ill. 2d at 345.

¶ 22 Here, the issue of whether defendant's girlfriend extracted information from him for the police was clearly adjudicated at the hearing on the motion to suppress where defendant argued that police sent his girlfriend into the interrogation room and used her to obtain information from him. As such, this issue was of record, and could have been raised on direct appeal, and defendant cannot avoid the effects of *res judicata* and waiver by couching his allegation in terms of ineffective assistance of counsel. *People v. Williams*, 186 Ill. 2d 55, 62 (1999); *People v. Flores*, 153 Ill. 2d 264, 277 (1992). Accordingly, we find that the issue is procedurally barred, and that the summary dismissal of his petition may be affirmed on that basis. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 23 Moreover, defendant's claim fails on the merits. Unlike the situation in *Rhode Island v. Innis*, 446 U.S. 291 (1980), and *People v. Patterson*, 146 Ill. 2d 445 (1992), relied on by defendant, there is no suggestion in the record that defendant's incriminating response to police, through or after spending time with Lynn, was the product of words or actions on the part of police that they should have known were reasonably likely to elicit an incriminating response. Rather, the record shows that defendant requested to speak with his girlfriend and that he considered himself in the company of his girlfriend and not a police agent when he spoke with her. Thus, the coercive atmosphere contemplated by *Miranda* was missing (*People v. Hunt,*

2012 IL 111089, ¶28), and defendant has failed to show that he was arguably prejudiced by the failure of trial counsel to call Lynn as a witness at the suppression hearing

¶ 24 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's post-conviction petition.

¶ 25 Affirmed.